

The Appeals Board has adopted the stipulations contained in the original November 5, 1986, Award and the February 19, 1998, Review and Modification of Award.

ISSUES

The Administrative Law Judge denied claimant's request to modify the June 1, 1989, Memorandum of Decision entered by Cowley County District Court. The Administrative Law Judge found claimant had failed to prove either her function impairment or work disability had changed since the District Court found claimant was entitled to a 50 percent permanent partial disability based on a work disability. Further, the Administrative Law Judge awarded claimant \$450 in attorney fees for services performed during the review and modification proceedings.

Claimant contends she has established that her physical condition has worsen and she is now permanently and totally disabled from engaging in any substantial gainful employment. Additionally, if the Appeals Board affirms the Administrative Law Judge, the claimant requested the Appeals Board to remand the award to the Administrative Law Judge to conduct an evidentiary hearing on claimant's request for reasonable attorney fees.

FINDINGS OF FACT

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

- (1) The original Award was entered in this matter on November 5, 1986. Claimant was awarded permanent partial disability benefits based on a 75 percent work disability. Claimant's request for payment of psychiatric treatment and temporary total disability benefits for a period claimant was hospitalized for the psychiatric treatment in September of 1985 was denied.
- (2) In an Order dated April 1, 1987, the Award was affirmed by the Director.
- (3) Claimant appealed the Award to the District Court of Cowley County, Kansas. Claimant's only issue on appeal was the denial of the payment of the temporary total disability benefits and medical expenses for the psychiatric treatment and hospitalization resulting from an overdose of an anti-depressant drug claimant took in a suicide attempt.
- (4) In a June 1, 1989, Memorandum of Decision, the District Court found respondent's submission letter to the Administrative Law Judge contained a stipulation that the psychiatric treatment and subsequent hospitalization incurred in September of 1985 was related to claimant's work-related low-back injury. Accordingly, since respondent admitted claimant's depression treatment was causally related to her work-related back injury, that was not an issue before the Administrative Law Judge. The medical expense and temporary total disability benefits associated with the psychiatric treatment were ordered paid by the respondent. Additionally, the District Court found claimant's work disability should be reduced from 75 percent to 50 percent.

(5) The claimant filed her Application for Review and Modification of the original Award on December 28, 1993. At that time, the respondent had paid claimant all the compensation benefits due claimant from the original Award in the amount of \$46,984.08.

(6) Claimant was originally injured on May 15, 1985, while employed by the respondent as a nurses aid. On that date, claimant injured her low back while lifting a patient.

(7) Respondent provided care and treatment for claimant's low-back injury initially with claimant's family physician, David A. Schmeidler, M.D., of Arkansas City, Kansas. Dr. Schmeidler first treated claimant on the date of her accident. He diagnosed lumbosacral strain with possible disc herniation. He took claimant off work and placed her in the hospital for traction and physical therapy treatment.

(8) A CT scan was performed that indicated a possible herniated disc. Dr. Schmeidler then referred claimant for examination and treatment to John Hered, M.D., a neurosurgeon located in Wichita, Kansas.

(9) Dr. Hered first examined claimant on May 28, 1985. On June 25, 1985, the doctor had a myelogram performed that showed an extradural defect at L4-5 due to a herniated disc fragment. On July 9, 1985, Dr. Hered performed an L4-5 laminectomy and discectomy that removed a large herniated disc compressing the nerve root.

(10) On September 3, 1985, Dr. Hered discharged claimant from further care. He assessed her with a 10 percent whole body functional impairment. The doctor restricted claimant from heavy lifting of 50 pounds or more, no repetitive bending, twisting, or stooping. Additionally, he recommended she not return to her job as a nurse's aid with the respondent and to find less strenuous employment.

(11) Claimant returned to Dr. Hered on January 2, 1986 with continuing pain in her hips and down her legs. The doctor's impression was that claimant obtained a satisfactory but not an excellent result from the surgical procedure. He felt claimant would not improve but she should continue her activities as much as possible. Except for that visit, Dr. Schmeidler provided all additional care and treatment for claimant following the September 3, 1985, release by Dr. Hered.

(12) On September 15, 1985, Dr. Schmeidler had claimant admitted to Arkansas City Memorial Hospital for treatment of a drug overdose. The diagnosis was depression. Dr. Schmeidler opined that claimant's work-related low-back injury and surgery was the precipitating event that caused claimant's acute depression and attempted suicide.

(13) In 1986, Dr. Schmeidler restricted claimant's work activities to clerical work with no lifting over 15 pounds and no stretching or strange work positions. The doctor further opined claimant could not perform the nursing aid job for respondent.

(14) Claimant started attending Cowley County Junior College in the fall of 1987 in accordance with an approved vocational rehabilitation program. She was graduated in May of 1989 with an associate degree in accounting. Claimant worked part time while attending college at Ark City Cable Company. After she was graduated she worked full time until she quit in September 1989 because she moved with her husband to Udall, Kansas.

(15) Claimant drove a school bus while she was living in Udall and also worked part time as clerical employee of an insurance company from September 1989 to May 1990. In May 1990, claimant quit both of those jobs and went to work as a bank teller at the Rose Hill State Bank.

(16) Claimant was never symptom-free after her May 15, 1985, accident. Since the accident, claimant testified her low-back condition worsened and deteriorated until she could no longer work. Claimant testified that since her accident she has had various exacerbations of her low-back symptoms that caused her to miss work on numerous occasions. These exacerbations were not caused by any separate incidents but occurred as claimant performed her regular work or daily living activities.

(17) The last day claimant worked was June 5, 1993, while she was employed by the Rose Hill Bank. On that day, claimant had completed an 11-hour day when her back became so painful that after work she had to be helped out of the car by her husband when she arrived home. Claimant testified her back had started hurting on Monday and gradually worsened until she completed the 11-hour shift on Friday.

(18) The Rose Hill Bank terminated claimant for excessive absenteeism, and claimant has not returned to work for any other employer since June 5, 1993, the last day she worked for the bank. Claimant testified she can not work because of the increased frequency of the flare-ups that she has with her low back. When these flare-ups occur, claimant testified, she has such excruciating and intense pain she is completely incapacitated.

(19) Dr. Schmeidler has continued to treat claimant's low-back problems since the 1985 accident. He testified and his medical records verify that over the years claimant has been seen on numerous occasions for treatment of her reoccurring low-back problem. Claimant was taken off work and treated for recurring low-back pain in 1989 and 1990 while she was driving the school bus and working part time at the insurance agency. Also, in 1992, claimant had another exacerbation of her low-back pain while employed by Rose Hill Bank. At that time, she missed approximately six weeks of work. Dr. Schmeidler treated claimant with anti-inflammatory medication and pain medication along with physical therapy when these various exacerbations occurred over the years.

(20) Dr. Schmeidler testified claimant's permanent restrictions had not materially changed since her 1985 accident. But her back condition had deteriorated because the

frequency of the exacerbations had increased. Claimant also has a phobia about working because of a fear of becoming totally paralyzed. Dr. Schmeidler related that phobia to her work-related low-back injury and polio she had as a child. He also opined that because claimant can not exercise, she had gained weight and was poorly conditioned, all related to her low-back problem. The exacerbations that claimant has experienced over the years since 1985 accident including the June 5, 1993, incident at the Rose Hill Bank, are all directly related to her 1985 low-back injury and none of those incidents represent a separate intervening accident.

(21) Respondent had claimant examined on two occasions, August 22, 1994, and March 10, 1997, by orthopedic surgeon Robert A. Rawcliffe, JR. M.D. The doctor found no substantial change in claimant's condition between his August 22, 1994, examination and the March 10, 1997, examination. Dr. Rawcliffe concluded claimant sustained an acute lumbosacral sprain/strain from the May 15, 1985, accident. He found it conceivable that claimant's permanent symptoms were the result of scarring or arachnoiditis along with degenerative disc disease. Arachnoiditis is nerve irritation that results from the scarring of connective tissue that surrounds the spinal canal. The arachnoiditis can be quite debilitating and was the result of the surgery. After surgery, a patient may likely get along fairly well and then gradually over many months or even years begin to develop symptoms.

Furthermore, Dr. Rawcliffe recognized that claimant was in a "catch 22" because physical activities intensified the pain but the proper treatment for all her low-back problems was exercise. He also felt claimant was depressed because of her physical problems. Since claimant had not worked for four years, it was the doctor's opinion that the chance of her returning to work was "virtually nil." But Dr. Rawcliffe also opined there was no physical or medical reason claimant could not return to work within the light work category.

(21) Respondent also had claimant examined and evaluated by orthopedic surgeon George A. Martin, M.D., of Ponca City, Oklahoma. Dr. Martin saw claimant once on September 19, 1994. He concluded that as a result of the May 15, 1985, injury and subsequent surgery that claimant had a 17 percent permanent functional impairment. But he believed claimant could work, and he placed no restrictions on her work activities. Dr. Martin would not assign any weight lifting restrictions unless he found a patient had instability that would make the patient more prone to reinjury.

(22) At the request of claimant's attorney, vocational expert Richard Santner interviewed claimant on June 21, 1994, to assess claimant's ability to find employment. At the time of the assessment, Mr. Santner had Dr. Schmeidler's medical records and the doctor's deposition taken on April 26, 1994. Later, before Mr. Santner's deposition was taken on March 14, 1995, he was provided with the August 22, 1994, report of Dr. Rawcliffe and the September 19, 1994, report of Dr. Martin. Mr. Santner opined claimant could not obtain or retain employment with any employer. No employer would or could accommodate claimant on a continual basis with the degree absenteeism claimant had experienced.

Reliability, dependability, and availability are critical issues with employers. Although an applicant has the qualifications to do a particular job, the applicant is not going to get the job if the employer can not depend on the applicant to be at work.

(23) Karen C. Terrill, a vocational expert, was employed by the respondent to determine claimant's ability to work in open labor market. She interviewed the claimant along with reviewing the medical records of Drs. Rawcliffe and Martin. Ms. Terrill also had been provided Richard Santner's vocational report and deposition.

Ms. Terrill found claimant qualified for bank teller jobs available in claimant's labor market area. It was Mr. Terrill's opinion that those jobs were within the permanent restrictions assigned by Dr. Rawcliffe. Ms. Terrill had not seen Dr. Schmeidler's medical reports or his opinions and did not have an opinion on whether claimant's frequent absences because of her low-back condition had an effect on claimant obtaining and retaining employment in the open labor market.

CONCLUSIONS OF LAW

(1) An original award may be reviewed for good cause shown upon application by one of the interested parties. If the competent evidence establishes that claimant's functional impairment or work disability has increased or diminished the award may be modified by increasing or diminishing the compensation. K.S.A. 44-528(a).

(2) The burden is on the party seeking review and modification of an award to establish a change in claimant's condition from the time the original award was entered. See Morris v. Kansas City Board of Utilities, 3 Kan. App.2d 527, 531, 598 P.2d 544 (1979).

(3) K.S.A. 44-510c(a)(2) (1981 Ensley) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.

(4) A claimant is permanently and totally disabled when he is found to be essentially and realistically unemployable. See Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

(5) It is the trier of fact function to decide which testimony is more accurate and or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. See Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

(6) The Administrative Law Judge denied claimant's request for the modification of the original Award from a 50 percent work disability to a permanent total disability. The Administrative Law Judge was persuaded by the medical evidence presented through the testimony of orthopedic surgeons Dr. Robert Rawcliffe and Dr. George Martin. But neither of these physicians treated the claimant, and both were employed by the respondent. Dr. Rawcliffe saw claimant on only two occasions, August 22, 1994, and March 10, 1997. Dr. Martin saw claimant once on September 19, 1994.

(7) Although Dr. Rawcliffe opined that claimant could work within the physical restrictions he placed on her, he also recognized claimant had gradually worsening symptoms since her 1985 injury and surgery, she was depressed because of the injury, and her chances of returning to work after she had been off for four years were slim.

In regard to Dr. Martin opinions, he did not place any restrictions on claimant's activities but assessed claimant with a permanent functional impairment of 17 percent which exceeds the 10 percent assessed by Dr. Hered in 1986 and the 10 percent assessed by Dr. Rawcliffe. The Appeals Board finds from a review of Dr. Martin's deposition testimony that his medical theory on the assessment of permanent restrictions for injured patients is to only impose permanent restrictions when a patient has such a severe injury that the activity would probably cause additional injury. The Appeals Board concludes that Dr. Martin's opinion on assessment of permanent restrictions is unrealistic from an occupational standpoint and in this case should therefore be given little or no weight.

(8) The Appeals Board concludes the most persuasive medical opinions contained in the record are those of claimant's treating physician, Dr. Schmeidler. Dr. Schmeidler was the only physician who testified that was completely familiar with claimant's work-related low-back injury as he treated the claimant both before and after the injury. In fact, Dr. Schmeidler remained claimant's treating physician when this case was submitted to the Administrative Law Judge in 1997 for a decision.

Although Dr. Schmeidler felt claimant's permanent restrictions had not materially changed since 1985, he did opine that her low-back condition had deteriorated to the point she could not work because of the frequency that she suffered exacerbations. Dr. Rawcliffe also recognized that claimant had worsening low-back symptoms probably because of residual scarring or arachnoiditis caused by the 1985 injury. Both doctors recognized claimant suffered from depression that was directly related to her 1985 low-back injury.

(9) Claimant testified she never had been symptom-free since her 1985 back injury. The flare-ups that she had with her low back increased in frequency over time. Those incidents caused her to be completely incapacitated because of the severe pain. She not only could not work, but she also had a very difficult time in performing essential daily living activities of taking care of herself and her home.

(10) Furthermore, vocational expert Richard Santner's testimony supports the conclusion that because of claimant's frequent incapacitating low-back flare-ups she is unable to find employment in her labor market area. Although she has the ability to perform sedentary clerical employment, her absenteeism, because of her low-back exacerbations, would not allow her to obtain or retain employment.

(11) Accordingly, the Appeals Board concludes that the record as a whole proves claimant is essentially and realistically unemployable and the Award should be modified entitling claimant to permanent total disability benefits of \$100,000. See K.S.A. 44-510f(a)(1) (1981 Ensley).

(12) Future medical treatment and any necessary referrals should continue to be provided through Dr. David A. Schmeidler.

(13) The effective date of any modification of an award shall be effective as of the date the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was filed. See K.S.A. 44-528(d).

The claimant filed her Application for Review and Modification on December 28, 1993. The Appeals Board finds that the claimant was permanently and totally disabled on June 6, 1993, the day after she last worked at the Rose Hill Bank. Since that date is more than six months from the date the application was filed by the claimant then the effective date of the modification is June 28, 1993.

(14) Claimant's attorney fee request is moot because claimant has been awarded additional compensation. See K.S.A. 44-536(g).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review and Modification of Award entered by Administrative Law Judge Nelsonna Potts Barnes dated February 19, 1998, should be, and is hereby, reversed and an award is granted in favor of the claimant, Georgia G. Robinson, and against respondent, Presbyterian Manors - Mid-America, and its insurance company, Insurance Company of North America, modifying the Memorandum of Decision entered by the District Court of Cowley County, Kansas, on June 1, 1989 from a 50 percent permanent partial general disability to a permanent total disability.

The parties stipulated that the original Award had been paid by the respondent in the total amount of \$46,984.08. Therefore, commencing June 28, 1993, claimant is entitled to a total of \$53,015.92 of permanent total disability compensation paid at a weekly rate of \$118.37 for a total award not to exceed \$100,000.

As of March 30, 1999, there is due and owing claimant the stipulated compensation previously paid of \$46,984.08, followed by 300.29 weeks of permanent total disability compensation at the rate of \$118.37 per week in the sum of \$35,545.33, making a total due and owing of \$82,529.41 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, claimant is entitled to permanent total disability compensation at the rate of \$118.37 per week until the total Award of \$100,000 has been paid or until further order of the Director.

The Administrative Law Judge's Order contained in the Award assessing respondent with costs of the court reporter fees is adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Richard J. Liby, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director